No. 454

Supreme Court of the United States

PEDRO AGUILAR,

Petitioner,

against

STANDARD OIL COMPANY OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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STATEMENT.

The petitioner was a seaman attached to the Steamship *E. M. Clark* owned by the respondent. While he was ashore on his own personal business, he was struck by an automobile and injured. The accident took place at the plant of a petroleum company which respondent neither owned, operated nor controlled. Respondent did not own, operate or control the automobile which struck the petitioner. Petitioner was returning to the vessel and was about a half mile from it when the accident occurred.

The District Court dismissed the suit at a pre-trial hearing (Record, page 12). 1940 A. M. C. 1577, not otherwise reported.

The petitioner appealed to the Circuit Court of Appeals which affirmed the judgment below. 130 F. (2d) 154.

The gist of the circuit court's opinion was as follows (Record, page 20):

> "• • • with the doubtful exception of *Hogan* v. *J. M. Danziger* (1938), Amer. Mar. Cas. 685, we have found no case holding that the right extends to such

injuries, and a number of cases hold that it does not. *Collins* v. *Dollar S. S. Lines*, 23 Fed. Suppl. 395; *The President Coolidge*, 23 Fed. Suppl. 575; *Smith* v. *American South African Line*, 37 Fed. Suppl. 262; *Lilly* v. *United States Lines Co.*, 42 Fed. Suppl. 214; *Wahlgren* v. *Standard Oil Company* (1941), Amer. Mar. Cas. 1788.

"The argument that as soon as the plaintiff had finished his business and started back to the ship, he went again into her service is untenable; the occasion for his return was the same as that for his leaving; i. e., his attention to his own business, not the ship's. *Hennessy* v. *M. & J. Tracy, Inc.*, 295 Fed. Rep. 680 (C. C. A. 4), was quite different; the seaman had to leave the ship after his discharge to be quit of the job. His position was like that of one who sleeps ashore and goes back and forth to work upon a harbor vessel; it is part of the business that he shall leave the ship at night and come back in the morning. *The Bouker No. 2*, 241 Fed. Rep. 831 (C. C. A. 2)."

The Issue.

The sole issue before the court is whether a seaman who was injured while he was one-half a mile away from the ship, while ashore on his own personal business, can impose upon his employer the cost of his maintenance and cure.

POINT I.

IT IS THE ANCIENT AND UNIVERSAL RULE THAT A SEAMAN INJURED ASHORE, WHILE THERE FOR PERSONAL BUSINESS, MAY NOT RECOVER FROM THE SHIPOWNER THE COST OF HIS MAINTENANCE AND CURE.

Early American cases have accepted the ancient codes and have founded the American doctrine of maintenance and cure on them. The Supreme Court of the United States

has accepted them. *The Osceola*, 189 U. S. 158. More recently, they have been recognized and applied in *Barlow* v. *Pan Atlantic S. S. Corporation et al.* (C. C. A. 2) 101 F. (2d) 697 and *The Berwindglen* (C. C. A. 1) 88 F. (2d) 125.

All of these codes limit the shipowner's obligation to pay maintenance and cure to cases in which the injury or illness was suffered in the service of the ship, meaning while on the ship, or ashore on ship's business.

The Laws of Oleron, Article VI (30 Fed. Cas. p. 1174).

The Laws of Hanse Towns, Article XXXIX (ibid. p. 1200).

The Marine Ordinances of Louis XIV, Title Fourth, Article XI, XII (ibid. p. 1209).

The Laws of Wisbuy, Article XVIII (ibid. p. 1191), which is as follows:

> "A mariner being ashore in the master's or the ship's service, if he should happen to be wounded, he shall be maintained and cured at the charge of the ship: but if he goes ashore on his own head to be merry, and divert himself, or otherwise, and happens to be wounded, the master may turn him off; and the mariner shall be obliged to refund what he has received, and besides to pay what the master shall be forced to pay over and above to another whom he shall hire in his place."

The foregoing rules have been invoked to deny seamen recovery for the cost of maintenance and cure where their injury was due to intoxication, *The Berwindglen, supra, Barlow case, supra, Lortie* v. *American-Hawaiian Steamship Company*, (C. C. A. 9) 78 F. (2d) 819; venereal disease or gross acts of indiscretion, *The Alector*, 263 Fed. 1007, *Chandler* v. *The Annie Buckman*, 5 Fed. Cas. 449 (Case No. 2,591a); a personal fight, *Lortie* v. *American Hawaiian Steamship Company, supra; Brock* v. *Standard Oil Com-*

pany of New Jersey, 33 F. Supp. 353; horseplay on board ship, *Meyer* v. *Dollar Steamship Line*, 49 F. (2d) 1002; playing baseball ashore, *Collins* v. *Dollar Steamship Lines, Inc. Limited*, 23 F. Supp. 395; willful misconduct, *Oliver* v. *Calmar S. S. Co.*, 33 F. Supp. 356; a motorcycle accident while returning from shore leave, *Smith* v. *American South African Line, Inc.*, 37 F. Supp. 262; riding in a truck away from the ship on personal business, *Wahlgren* v. *Standard Oil Company of New Jersey*, 1941 A. M. C. 1788; a fall off a dock to which his ship was moored during a blackout, after he returned from shore leave, *Lilly* v. *United States Lines Company*, 42 F. Supp. 214 and finally, in pursuit of a personal matter, *The President Coolidge*, 23 F. Supp. 575.

Reed v. *Canfield*, 20 Fed. Cas. 426 (Case No. 11,641) is cited as authority by petitioner. However petitioner overlooks the fact that the seaman, in that case, was in the performance of service to his ship at the time the injury occurred. Previously, the seaman, pursuant to orders, had rowed the ship's mates from the vessel's anchorage to shore, in the ship's rowboat. The injury occurred when he and fellow seamen were rowing the boat back to their ship. The issue was whether the shipowner had the burden of the seaman's maintenance and cure when the misfortune befell the seaman at a "home port". The contention which the petitioner makes here, viz.: that maintenance is payable when the injury occurs while ashore for personal business, was not even mentioned.

However, the language of Judge Story bears upon the issues in the present case. He said at page 428:

> "* * *. Lord Tenterden, in his excellent treatise on Shipping, lays it down generally, 'that by the ancient marine ordinances, if a mariner falls sick during the voyage, or is hurt in the performance of his duty, he is to be cured at the expense of the ship;

but not, if he receives an injury in the pursuit of his own private concerns.' And he is fully borne out in this statement by the language of the ordinances cited by him on this occasion. * * *." (Italics ours.)

The test of whether or not a seaman is in the service of a ship was carefully discussed in the *Meyer* case, *supra*, where the injury was due to "horseplay" on the ship. The court said, page 1003:

> "The phrase 'in the service of the ship,' as applied to ordinary seamen, is closely analogous to the phrase 'in the line of duty,' as applied to soldiers or sailors in the service of the United States. The differences in the status of an ordinary seaman, for example, and that of a sailor are obvious at once, but there is a similarity in the narrow employer-employee relationship in both cases.
>
> "'Line of duty' is defined as follows: 'A person in the active service and submitting to its rules and regulations is, in general, in the line of duty.' Naval Courts and Boards, chapter XII, §1022.
>
> "An injury suffered or a disease contracted by a sailor is considered to have been 'in the line of duty' 'unless it is actually caused by something for which he is responsible which intervenes between his service or performance of duty and the injury or disease. He will be responsible for an intervening cause if (1) it consists of his own wilful misconduct, or (2) it is something which he is doing in pursuance of some private avocation or business, or (3) it is something which grows out of relations unconnected with the service or is not the logical incident of provable effect of duty in the service.' *Ibid.*"

The petitioner does not mention *Angco et al.* v. *Standard Oil Company of California* (C. C. A. 9), 66 F. (2d) 929, which he was unable to successfully distinguish below. The

court there describes the status of a seaman on shore leave as follows, page 930:

> "When Warner left the ship at Kahului he was off duty, upon pleasure bound, and was beyond the scope of his employment. Unless some unforeseen emergency arose he would not again come within the scope of his employment until he returned to the vessel. He was under no instructions to perform any service in any way connected with his employment; his sole responsibility, to return to his ship before she sailed, was a personal one. • • •"

In the *Collins* case, *supra*, the seaman was injured ashore. The Court, after stating that the doctrine of charging the shipowner with a seaman's maintenance and cure should be liberally applied, said, page 397:

> "• • •. It is reasonable and logical to say that if injured in the ship's service the seaman shall be cared for by the ship. To extend the obligation of the ship beyond this so as to require it to provide maintenance and cure for one who was injured on shore while engaged in his personal affairs would be to place an unfair burden upon the ship and would relieve the seaman of the risk that he himself should properly assume. I find no authority which would justify recovery of maintenance and cure by the libelant."

Petitioner argues that his accident should be considered as having occurred "in the service of the ship" because an accident in similar circumstances to a shore worker would have been within state compensation laws. There, the test is whether the accident "arose out of and in the course of the employment". He says (Brief, page 10), that there are three cases involving seamen where the maritime law of maintenance and cure was held to be based on the same rule

as modern compensation laws. Of the three cases cited, two involved injuries which occurred to the seamen while actually aboard vessels, *Hennessey* v. *M. & J. Tracy, Inc.*, 295 Fed. 680 and *Wong Bar* v. *Suburban Petroleum Transport Inc.*, 119 F. 2d 745. The third case, *T. J. Moss Tie Co. et al.* v. *Tanner, et al.*, 44 F. 2d 928 did not involve a seaman, but a longshoreman, who was riding on a sling suspended from a boom of a ship. His injury was held to "arise out of and in the course of his employment" under the applicable compensation act.

There is nothing in these cases which supports the petitioner in his statement that the courts have held that the phrase "in the service of the ship" as applied to seamen has the same meaning as the phrase "arising out of and in the course of his employment" as applied to a shore worker.

Workmen's compensation rights furnish no analogy to maintenance and cure. The two spring from entirely different sources. Workmen's compensation is statutory and gives an injured employee part of his wages and prompt medical attention without regard to whether negligence was a causative factor in the accident. On the one hand, it requires the employer to pay a portion of the wages for temporary disability, scheduled amounts for permanent disability and provide the medical attention and, on the other hand, deprives the employee of the right to sue his employer for indemnity. There was a compromise of the rights of the parties but with favor to the employee. This was just and intended to put upon the industry the cost of injury to the employees therein. To carry out the beneficial purposes of the law, it was generously interpreted to extend to situations beyond the actual course and place of work. The cases cited by the petitioner in his brief are such cases.

Such cases have nothing in common with maintenance and cure, which has a historical background of entirely dif-

ferent implication. As the Circuit Court observed (Record, pp. 19-20):

> "* * *. A distinction based upon the same activities of the seaman ashore and on board ship is perhaps *a priori* not very reasonable; but it has from ancient times been true that what takes place on the ship may have different legal consequences from the same events on the land. Besides, the risks of even amusement on board ship are more contracted than those on land; and as to a seaman's private business, it can scarcely be said to be part of the ship's service in any sense. * * *".

One of the results of the historical background of maintenance and cure is that a seaman's right to indemnity for negligence is not restricted. This was so even before the Jones Act (46 U. S. C. 688). On the other hand, the social purpose behind modern compensation acts requires such restriction.

The Circuit Court referred to this preferred status of seamen as follows (Record, page 18):

> "The outlines of the seaman's right to maintenance and cure have remained fairly constant from very ancient times; until Congress sees fit to change its incidents, the court should enforce it as it is; it has already been generously supplemented by the Jones Act (688, Title 46, U. S. Code)."

Accordingly, Workmen's Compensation is allowed wherever the accident arises out of and in the course of the employment, but maintenance and cure is limited to cases where the injury or illness arose "in the service of the ship". A seaman who is ashore for his own pleasure is not "in the service of the vessel" nor is he "subject to the call of duty". Even were this the case where the broad rule of Workmen's Compensation was applicable, viz.: "arising out of and in

the course of his employment", this injury would not come within such a rule. Here, there was no necessity for the seaman to go ashore. He had his home aboard the vessel.

As the Circuit Court of Appeals pointed out, there is a distinction between those cases where an employee is required to sleep ashore and the cases where he sleeps on and makes his home aboard his vessel. If it could be said that a seaman who is required to sleep ashore is still engaged upon his employment while he is going back and forth, there is no justification for a similar statement concerning an employee who is provided with sleeping accommodations aboard the vessel. His employer has no interest whatever in his going back and forth to shore upon personal errands of pleasure.

The petitioner seeks to avoid the effect of these adverse decisions in two ways. First, he refers to the scene of the accident, which was a half a mile away from the vessel, as a "means of ingress" to the ship (Petition, p. 3). He says that when the seaman started home, he passed on to the "means of ingress to his ship" (Brief, p. 13).

He also adopts a phrase from a workmen's compensation case involving a longshoreman, whom he calls a seaman, to imply that it has some application in the case at bar (Brief, page 10). *T. J. Moss Tie Co. et al.* vs. *Tanner et al., supra.* The phrase is "the route of immediate ingress and egress". The petitioner says that an immediate ingress and egress may cover "extensive distance".

However, the blunt fact is that the petitioner was a half a mile away from the ship when he was injured and that fact cannot be changed by referring to it as "a means of access" or as a "route of immediate ingress and egress."

The second device which the petitioner uses to escape the weight of authority against him is to erroneously assert that the ancient case of *Reed* v. *Canfield, supra,* involved an

injury to a seaman who had gone ashore for pleasure and has been squarely reversed by the decision of the Circuit Court of Appeals in this case.

The fact was that in *Reed* v. *Canfield, supra,* the libelant, when injured, was actually engaged in carrying out orders issued to him by the mates. He was in the ship's rowboat on the way back to his vessel. He had gone ashore by order of the mates for the express purpose of rowing the mates ashore. The petitioner is in error when he states that libelant had "overstayed his allotted time". The specific finding by the lower court, which was not disturbed on appeal, was that the libelant had not overstayed his leave. *Canfield* v. *Reed,* 5 Fed. Cas. 9 (Case No. 2,381) at page 10. The opinions in both courts not only do not support the petitioner's statements but there is nothing in them which in any way impairs the ancient and modern authority which denies maintenance and cure to a seaman who is injured while on shore on his own personal business.

These cases directly hold that when a seaman goes ashore for his own pleasure, he is not in the service of the ship. Such a seaman is not "subject to the call of duty". Indeed, he has deliberately placed himself in a position where he cannot hear the call of duty and has done it for purposes of his own pleasure. If duty called him, he could not be found.

POINT II.

THE PETITION SHOULD BE DISMISSED.

Respectfully submitted,

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